STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: R. Gribbs, P.J., J. Hoekstra, and J. Markey, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

MARCEL R. RIDDLE

Defendant-Appellant.
_____/

Supreme Court No. 118181

Court of Appeals No. 212111

Lower Court No. 97-6731-01

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF JURISDICTION

Jurisdiction in this Court is based on MCR 7.302 and Mich Const 1963, art 1, §20. The defendant-appellant was sentenced court on April 23, 1998. The request for appointment of counsel was filed April 27, 1998. The claim of appeal was entered June 18, 1998. The Court of Appeals affirmed the conviction on October 13, 2000. This Court granted leave to appeal on October 3, 2001.

STATEMENT OF QUESTIONS PRESENTED

I. Whether a person facing a threat of imminent deadly attack while at the entrance of his garage, just steps away from his house and within its curtilage, may stand his ground and meet the attack in kind without first pausing to contemplate whether he might safely retreat?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-appellant Marcel Riddle stood trial in Wayne County Circuit Court, Judge Sean Cox presiding, on charges of first-degree murder[1] and felony firearm.[2] Following two days of deliberations, a jury convicted Mr. Riddle of second-degree murder[3] and felony firearm, and thereafter Judge Cox sentenced him to consecutive terms of fifteen-to-thirty and two years imprisonment.

Robin Carter was shot in the legs eleven times (65a), and died three days later (21a). Marcel Riddle admitted shooting Carter, who was his friend and drinking companion, but said he acted in self-defense. A mutual friend and the only other witness to the shooting, James Billingsley, disputed Mr. Riddle's account. There was no dispute that the three men had been drinking all day.

Both Marcel Riddle and Billingsley agreed that the three men had met earlier in the day at Billingsley's house, had gone to another house where Mr. Riddle and Billingsley had played cards, and then had moved to Mr. Riddle's house, where Mr. Riddle planned to grill fish. 26a-33a; 75a-92a. Mr. Riddle and Billingsley also agreed that Carter and Billingsley had talked in the driveway just outside Mr. Riddle's garage[4] while Mr. Riddle prepared the grills. 33a; 95a-96a.

From there, though, the stories diverged. According to Billingsley, the incident began with a "little smart comment" by Carter to Mr. Riddle's fiancee, Anita Marshall. 41a. Billingsley could not recall the exact comment, but claimed that it prompted Mr. Riddle to

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[1] MCL 750.316.
[2] MCL 750.227b.
[3] MCL 750.317.

admonish Carter, "I done told you about talking to my old lady like this, man." 41a. Carter, said Billingsley, became contrite "right quick" (41a), telling Mr. Riddle "Sorry, man. I'm sorry. I won't do that no more." 42a. Said Billingsley, Mr. Riddle accepted the apology coolly and calmly (42a), and quietly went back to work at the grill (43a). When, in Billingsley's telling, Mr. Riddle walked into the house a few minutes later, Billingsley thought nothing of it; nor did he notice that Riddle had returned with a carbine rifle until Riddle began shooting at Carter. 44a-45a. In this account, Mr. Riddle said nothing (47a) and there were no voices raised (48a) before the shooting.

Marcel Riddle, testifying in his own behalf, told a much different story. The incident did begin while he prepared the grills, but it began with a quarrel between Carter and Billingsley, not a smart remark to Anita Marshall. 96a. At the card game, Carter had loaned Billingsley about $80 for gambling in return for Billingsley's promise to cash a check and repay Carter that night (88a)[5]; however, after arriving at Mr. Riddle's house Billingsley called home, then told Carter the check had not yet arrived (96a). Words were exchanged, and Mr. Riddle was forced to intervene. 97a-98a. Soon the argument flared up again, and again Mr. Riddle intervened. 98a. When the argument resumed a third time, Mr. Riddle told Carter (whom Mr. Riddle viewed as the aggressor, 98a) to "chill or move the fuck on." 99a. Carter now turned his anger on Mr. Riddle, telling Mr. Riddle "Don't play me like that. I'll fuck you up." 108a. Carter reached behind him and pulled out a "dark object" (113a) that Mr. Riddle

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[4] The prosecution used diagrams and photographs as trial exhibits to show the relationship of the parties to the garage, and of the garage to the house. Copies of two of these photographs are included in the defendant-appellant's appendix at page 141a.

[5] Billingsley described a loan for $50, and said it was from Mr. Riddle, not Carter. Supplemental Appendix (see note 9, below). Marcel Riddle denied lending Billingsley money, saying he had refused to do so because Billingsley still owed him money from a previous debt. 87a-88a.

thought was a gun (111a). Mr. Riddle immediately reached for his own gun, a .30 caliber automatic carbine rifle he kept in the garage,[6] and, pointing it at Carter's legs, pulled the trigger. 100a. Mr. Riddle intended to frighten Carter, not to kill or even injure him. 100a.

Mr. Riddle's account found support in the testimony of Anita Marshall and that of a teenaged neighbor. Ms. Marshall confirmed that she had briefly walked over to the three men while Marcel was readying to grill the fish, but denied that Robin Carter had said anything at all to her. 55a. She also testified that, after ever since she asked him to move it from the house, around New Year's day, Marcel Riddle had kept his rifle in the garage. 58a. William Hobson, the neighbor, reported that he heard both gunshots and a five-minute-long argument that immediately preceded them. 63a.

In addition to the self-defense instruction, defense counsel requested a no-duty-to-retreat-in-own-home instruction. 114a. The trial judge refused to give the no-retreat instruction[7] (115a) and instead gave a duty-to-retreat instruction[8] (127a-128a).

During cross-examination, the prosecutor had pressed Mr. Riddle about his failure to retreat:

> "Q: Now, at any point in time when you had to keep calming these guys down and doing that sort of thing, did you ever leave the yard and go into the house?
> A: No, sir.
> * * * *
> Q: Mr. Riddle, why didn't you leave?
> A: Why I didn't?
> Q: Why didn't you leave?
> * * * *

[6] Mr. Riddle testified that he had received the gun as payment for a debt, and had fired it only once before, "at New Year's." 72a-73a. He kept the gun laying against the wall at the front of the garage. 73a-74a.
[7] CJI2d 7.17.
[8] CJI2d 7.16.

> Q: Why didn't you leave? Instead of grabbing the gun, why didn't you go in the house? Why didn't you go in the garage? Why didn't you go someplace other than grab the gun?
> A: Sir, I was trying to calm down a situation between two grown men and what not who was under the influence of alcohol as well as myself. And I reacted to a situation when I seen an object in an individual's hand when he said he'll fuck me up.
> Q: So, your answer to why you didn't leave is you were trying to calm down the situation with a .30 caliber Carbine?
> A: Sir, I reacted to a situation. I was threatened." 105a; Supplemental Appendix, 143a-144a.[9]

Later, during rebuttal summation, the prosecutor had emphasized what he called Mr. Riddle's duty to retreat:

> "And I believe that the Judge will also instruct you, ladies and gentlemen, on the duty to retreat. I believe he will instruct you that a person must avoid using deadly force if he can safely do so.
>
> If the defendant could have safely retreated, but did not do so, you may consider that fact along with the other facts and circumstances when you, when you decided [sic] whether he went farther in protecting himself that he should have.
> * * * *
>
> Yes. A man's house, excuse me, a man and woman's house, sorry, is their castle. Mr. Riddle's not in the castle. He's out in the kingdom. It doesn't extend that far. He's out running around in the yard." 116a-117a.

After the jury convicted him and Judge Cox sentenced him, Mr. Riddle appealed by right to the Michigan Court of Appeals. Pointing to Michigan Supreme Court precedent that had never been overruled, he argued that because he was within the curtilage of his house he was entitled to a no-duty-to-retreat instruction, and that the trial judge's decision to give a duty-to-retreat instruction instead was reversible error. A panel of the Court of Appeals disagreed, ruling that the law in Michigan imposes a duty to retreat before use of deadly force in self-defense, except when the person attacked is inside the person's home or inside "an

inhabited outbuilding" located within the curtilage of the person's home. Court of Appeals Opinion at 2 (14a). Mr. Riddle now appeals by leave granted.

[9] Three pages of the transcript (Vol. II, page 61, and Vol. III, pages 106-07) were inadvertantly omitted from defendant-appellant's appendix. They are attached at the end of this brief in a supplemental appendix, as pages 142a-144a.

I. A MAJORITY OF JURISDICTIONS DO NOT REQUIRE A PERSON CONFRONTED WITH A DEADLY ATTACK TO RETREAT BEFORE USING DEADLY FORCE IN SELF-DEFENSE, AND AN EVEN GREATER MAJORITY DO NOT REQUIRE RETREAT IF THE ATTACK OCCURS, AS HERE, WITHIN THE CURTILAGE OF THAT PERSON'S HOME. THIS COURT, WHICH ONCE WAS AN INFLUENTIAL EXPOSITOR OF THE MAJORITY VIEW, SHOULD RENOUNCE THE CONTRARY RULE ADOPTED BY THE COURT OF APPEALS AND ORDER A NEW TRIAL.

Summary of Argument

Most American jurisdictions do not require a nonaggressor to contemplate retreat before using deadly force in self-defense; those that do make an exception when the person attacked is in his or her dwelling, or "castle"; and most of these construe the "castle" to include the dwelling's curtilage. Until 1974, Michigan was a state that imposed no duty to retreat when a person attacked was within the curtilage. In 1974, the Michigan Court of Appeals purported to change that rule to limit the right of no-retreat to the inside of one's own dwelling or of an inhabited outdwelling on one's property. Such a rule does not make sense, and is out of step with the modern trend to expand the "castle doctrine" to include the workplace, and even one's automobile. This Court should adopt the majority rule of no-retreat, or at least recognize the continuing validity of its original conception of the castle doctrine, one that required no retreat within the curtilage. Because the assertedly self-defensive killing here occurred at the threshold of Mr. Riddle's garage, within the curtilage of his home, he was entitled to the "no duty to retreat" instruction that he requested and was prejudiced by the "duty to retreat" instruction that he instead received. Especially where the trial prosecutor relied on the argument that Mr. Riddle's actions could not have been in self-defense because he ignored his duty to retreat—in the prosecutor's words, where he was "not

in his castle" but instead "running around in the kingdom"—the doubly erroneous instructions more likely than not affected the jury's verdict, and Mr. Riddle is entitled to retrial.

Issue preservation

As the Court of Appeals correctly ruled, the issue raised on appeal was fully preserved because counsel objected to a duty-to-retreat instruction and requested a no-duty instruction, and because the trial judge ruled on both the objection and the request. Court of Appeals Opinion at 1 (13a); 114a-115a.[10]

Standard of review

Michigan appellate courts "review de novo a claim of instructional error." People v Hubbard, 217 Mich App 459, 487 (1996).

[10] Even though counsel offered to withdraw his objection and request when the judge complained about the timing of them—an offer the judge rejected—the purpose of the preservation rule was satisfied. The preservation requirement serves "to induce litigants to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." People v Mayfield, 221 Mich App 656, 660 (1997). That purpose is fulfilled where, as here, "the trial judge's attention" is called to the problem and the judge in fact makes a ruling. People v Bradford, 69 Mich App 583, 586 (1976); see also People v Morton, 213 Mich App 331, 335 (1995) (counsel's acquiescence to adverse ruling did not waive appellate review).

Argument

A. A MAJORITY OF AMERICAN JURISDICTIONS REJECT THE DUTY-TO-RETREAT RULE ALTOGETHER, AND MOST OF THOSE THAT DO NOT MAKE AN EXCEPTION FOR ACTS THAT OCCUR WITHIN THE CURTILAGE.

In keeping with the American tradition of individual rights and self-determination, most American jurisdictions have altogether rejected the idea that a nonaggressor must contemplate retreat before using deadly force to defend against a deadly[11] attack.[12] In these jurisdictions, it does not matter where the attack occurred, at least as long as the person attacked had a right to be there: if the person attacked reasonably believes himself in imminent danger of death or great bodily harm, he or she may counter with deadly force even when safe retreat is possible.

A "substantial minority" of jurisdictions require retreat, if safe retreat is possible, but all of them make an exception when the person attacked is in that person's own home.[13] This view—called the "castle doctrine"—is broad enough to include, in most[14] of the jurisdictions that apply it, the "curtilage" of the home—the land and outbuildings immediately surrounding

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[11] "It seems everywhere agreed that one who can safely retreat need not do so before using *nondeadly* force." 1 LaFave & Scott, Substantive Criminal Law, § 5.7(f), p 659 (1986) (hereinafter, "LaFave & Scott") (emphasis added).

[12] See LaFave & Scott at 659 ("[t]he majority of American jurisdictions holds that the defender (who is not the original aggressor) need not retreat, even though he can do so safely"); Perkins and Boyce, Criminal Law, Ch. 10, § 4(A)(1), p 1127 (The Foundation Press, 1982) (hereinafter, "Perkins & Boyce") (no-retreat "the majority view"); Model Penal Code § 3.04, Comment (4)(c) ("Limitations on Use of Deadly Force—Duty to Retreat"), p 53 (recognizing that "right to stand one's ground" the "preponderant position" when Model Code drafted).

[13] Perkins & Boyce, supra, at § 4(A)(2), p 1133; see also LaFave & Scott, supra, at p 660 ("a strong minority").

[14] "That the rule is not limited to the dwelling house, strictly speaking, seems to be generally conceded, and there is general agreement that no duty to retreat rests upon one who, without fault, is attacked by another when in his own curtilage." 40 Jur 2d, "Homicide," § 168 ("Extent of Dwelling or Premises Where One Need Not Retreat") (footnotes omitted).

it. Moreover, the trend among those states following the castle doctrine is to expand it even further, to include one's place of work and one's automobile.[15]

A minority of jurisdictions within the minority that follow the retreat rule limit the castle-doctrine exception to acts occurring within the dwelling.[16]

B. REASONS GIVEN FOR THE MAJORITY AND MINORITY VIEWS.

The majority rule of no-retreat fits well with the American tradition of individualism and personal autonomy. As one early court put it, "[t]he tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed." Runyan v State, 57 Ind 80, 84 (1877).[17]

The classic statement of the American no-retreat rule comes from the Ohio Supreme Court, in Erwin v State, 29 Ohio St 186, 199-200 (1876):

> "Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is not provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."

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[15] LaFave & Scott, supra, at 660, n 66; Perkins & Boyce, supra, at 1135-36.

[16] Some, if not most, of those few states that restrict the no-retreat rule to the inside of the dwelling house do so not as an exercise in common-law interpretation but because of statutes specifically confining the rule to the "dwelling." See, eg, Hopes v State, 294 Ark 319, 322 742 SW 2d 561 (1988); Commonwealth v Carlino, 429 Mass. 692, 697; 710 N.E.2d 967 (1999). And where the legislature indicated no intent to change the common-law understanding, at least one court has interpreted a statutory "dwelling" restriction broadly enough to include the curtilage. State v Pugliese, 120 NH 728, 731-32 422 A2d 1319, 1322 (1980).

[17] Though American courts sometimes thought themselves to be departing from the English common-law rule that required "retreat to the wall," Perkins and Boyce argue that in actuality the English common-law rule required retreat only by those who were themselves at least partly responsible for the violent encounter, such as a first aggressor or a mutual combatant. Innocent victims of a felonious attack were never required to flee. Perkins & Boyce, supra, at 1120-22, 1137; see also People v Crow, 128 Mich App 477, 487-88 (1983).

The court's use of the phrase "a true man"—from which the no-retreat rule came sometimes to be known as the "true man doctrine"—has led some to suppose that the primary justification for the rule is raw machismo: the reflexive notion "that to retreat [is] cowardly and dishonorable, not befitting a true man of courage." 2 Robinson, Criminal Law Defenses, § 131(d), p 84 (1984) (hereinafter, "Robinson"); see, eg, Gillespie, Justifiable Homicide: Battered Women, Self-Defense, and the Law, p 80 (Ohio St U Press, 1989) (true-man doctrine embodies "nineteenth-century hairy-chestedness"). Those who hold this view of the true-man doctrine—a view that substitutes "brave" or "manly" for "true"—make the "civilized"[18] reply that the law should give primacy to the life-respecting impulses of the "honorable man":

> "A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would always regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow being on his hands." Beale, Retreat From Murderous Assault, 16 Harv L Rev 567, 581 (1903) (hereinafter, "Beale").

The phrase "true man," however, refers not to a brave or manly person, but to an honest and unculpable one,[19] and the no-retreat rule in actuality "balances the harm inflicted on the aggressor against the actor's personal safety, society's condemnation of unjustified aggression, and the actor's interest in avoiding cowardice." Robinson, supra (emphasis in original). This broader conception takes account of the threat "to liberty itself . . . if a law-abiding citizen can be forced from a place where he has a right to be,"[20] as well as "the deterrent effect on pending and future attacks, and the unenforceability of curbs on the basic

[18] 1 LaFave and Scott, supra, at 660.

[19] Epps, "Any Which Way But Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American 'Retreat Rule,'" 55 Law & Contemp Probs 303, 331 n 56 (Winter 1992) (hereinafter, "Epps").

human instinct towards self-preservation."[21] In short, the no-retreat rule protects not just the dignity of the one assaulted, but also society's interest in discouraging wrongdoers and in preserving the right of a law-abiding citizen to remain where he or she has a right to be.

Proponents of a retreat rule reply that the value of the violent aggressor's life outweighs competing considerations. "[T]he protection of human life has such a high place in a proper scheme of social values that the law should not permit conduct which places life in jeopardy, when the necessity for doing so can be avoided by the sacrifice of the much smaller value that inheres in standing up to an aggression." Model Penal Code § 3.04, Comment (4)(c) ("Limitations on Use of Deadly Force—Duty to Retreat"), p 54. They would leave to law-enforcement the responsibility to deter aggressors. See id. ("the proper and sufficient remedy is not a trial of strength but rather a complaint to the police").[22]

Another reason for rejecting a duty to retreat is the belief that such a duty will increase the risk to the person attacked. By requiring a person attacked to pause even briefly to contemplate the possibility of escape, the retreat rule fractionally increases the possibility that the person's momentarily delayed act of self-defense will be ineffectual. Where the attack comes in the form of a brandished gun, when safe retreat is at best unlikely, anyway, the momentary delay in response may have fatal consequences. As the Minnesota Supreme Court long ago explained in State v Gardner, 96 Minn 318, 327; 104 NW 971, 975 (1905):

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[20] Perkins and Boyce, Criminal Law, Ch. 10, § 4(A)(1), p 1128 (The Foundation Press, 1982) (hereinafter, "Perkins and Boyce").

[21] Green, "Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles," 1999 UILLR 1, 24 (hereinafter, "Green").

> "[t]he doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm. What might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction."

Proponents of a retreat rule answer that the risk is not increased because the rule requires retreat only when safe;[23] this answer fails, however, to consider the increased risk that comes from merely stopping to consider whether or not retreat is safe.

This answer also fails to consider what may be the most cogent reason of all for not imposing a duty to retreat—that a person confronted with a deadly attack should not be expected to coolly and rationally weigh the alternatives before responding. As Justice Holmes famously put it in Brown v United States, 256 US 335, 342; 41 S Ct 501; 65 L Ed 961 (1921):

> "Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this court at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety, or to disable his assailant rather than to kill him."

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[22] "Despite the stand taken by the [American Law] Institute the trend has been rather in the direction of enlarging, rather than narrowing, the defensive privilege against murderous attack. Courts which adopted the 'no-retreat rule,' frequently under the false impression that this required departure from the English common law, have shown little tendency to alter this stand. The other courts, as pointed out, have shown an inclination to enlarge the 'castle' concept, sometimes to the point of going over entirely to the other position." Perkins & Boyce, supra, at 1137 (footnote omitted).

[23] See Perkins and Boyce, supra, at 1134.

In that minority of jurisdictions in which courts impose a retreat rule but qualify it with a "castle doctrine" exception, two reasons are given for the universally recognized exception. "One is that a person should not be required to face a possibly greater danger by retreating than he would if he remained inside the home." Green, supra, at 9. The home is "the ultimate place of safety. To require an actor to retreat from there would generally require him to thereby create a greater risk to his own safety, a result that neither the rule nor its rationale would support." Robinson, supra, at 86; see also Beale, supra, at 580 (retreat duty applied to person at home would expose person to dangers home is supposed to protect). "A second [reason] is that no one should have to face what Justice Cardozo called being a 'fugitive from his own home.'" Green, supra, at 9;[24] see also People v Godsey, 54 Mich App 316, 319 (1974).

In that majority of the minority that construe the "castle doctrine" exception broadly enough to include the curtilage of the home, courts emphasize (i) the defendant's right to stand his ground on his own property, especially against the attack of someone who does not have the same right, and (ii) the arbitrariness of recognizing a right of no-retreat within the dwelling but not just outside it. Justice Harlan famously alluded to both factors when deciding the case of a man, Beard, who shot in claimed self-defense while on his property, fifty or sixty yards from his house, then was convicted after a judge told the jury that Beard had a duty to retreat because the right of no-retreat was limited to the "dwelling house."

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[24] Quoting People v Tomlins, 107 NE 496, 497 (NY, 1914), in which Justice (then Judge) Cardozo wrote:

> "The homicide occurred in the defendant's dwelling. It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home."

Beard v United States, 158 US 550, 555; 15 S Ct 962; 39 L Ed 1086 (1895). Emphasizing that the land on which Beard stood was "his own premises, constituting a part of his residence and home," Justice Harlan wrote for a unanimous court that "we cannot agree that the accused was under any greater obligation when on his own premises, near his dwelling house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling house." Beard, 158 US at 559-60.

In support of a view that restricts the "castle doctrine" exception to the dwelling, it is assumed that the person attacked outside the dwelling may always retreat inside, into the "ultimate place of safety." Robinson, supra, at 86. This assumption ignores the reality that sometimes retreat inside the dwelling will expose others, already inside, to the same danger that the retreater is trying to avoid. See, eg, Commonwealth v Daniels, 451 Pa 163; 301 A2d 841 (1973) (where guests present in dwelling, defendant entitled to step outside to confront aggressors before they could enter).

C. UNTIL 1974, MICHIGAN FOLLOWED THE VIEW THAT A PERSON ATTACKED HAD NO DUTY TO RETREAT WHEN WITHIN THE CURTILAGE OF HIS OR HER HOME.

Michigan has long followed the common-law rule that a person attacked in his own home has no duty to retreat. See Pond v People, 8 Mich 149, 176 (1860) (Campbell, J). Moreover, this Court long ago decided, in a series of cases, that this rule of no-retreat extends to the land and outbuildings in the immediate vicinity of the home. People v Lilly, 38 Mich 270 (1878); Pond, 8 Mich at 181; see also Patton v People, 18 Mich 313 (1869).

Until 1974, the accepted understanding of the rule of no-retreat was that reflected in a reading of the cases cited above: that it included the curtilage of the home. See Use Note, CJI 7:9:02 (1st ed) ("Use [no-duty-to-retreat instruction] where the act occurred in the defendant's

dwelling **or within its curtilage**. *Do not use [duty-to-retreat] instruction*") (bold emphasis added; italicized emphasis in original); see also CJI 7:9:03; Commentary, Defenses, CJI 7-195 through 7-197.

This was the understanding of the Michigan view not only in Michigan, but elsewhere. Justice Harlan, writing for a unanimous United States Supreme Court, cited Pond, supra, as one of several cases supporting the Court's conclusion that a man "attacked, while on his premises, outside of his dwelling house," was under no "legal duty to get out of the way, if he could, of his assailant." Beard, 158 US at 563-64. Justice (then Judge) Cardozo, for the New York Court of Appeals, noted that in Beard the no-retreat rule was "held to extend, not merely to one's house, but also to the surrounding grounds," then observed that "the same rule is enforced in Michigan." Tomlins, 213 NY at 243; 107 NE at 497. And this view was shared by those who kept track of the evolution of the common law. See Robinson, supra, at 86 n 59 (citing Pond as supporting view that the "owner need not retreat from a murderous attack that occurs in the immediate vicinity of his home or curtilage"); 52 ALR2d 1458, Annotation, "Homicide: Extent of Premises Which May Be Defended Without Retreat Under Right of Self-Defense," § 2; 40 Am Jur 2d, Homicide, § 168 ("Extent of Dwelling or Premises Where One Need Not Retreat").

In 1974, a 2-1 decision by the Court of Appeals upset the accepted understanding. People v Godsey, 54 Mich App 316. Godsey purported to limit the no-retreat rule to "**inhabited outbuildings** located within the curtilage of the home." Godsey, 54 Mich App at 321 (emphasis added).[25] Although recognizing itself bound to follow this Court's decision in Pond, supra, the

[25] This changing view is reflected in the use notes and commentary to the first and second editions of the criminal jury instructions. At first, in a possible attempt to reconcile Godsey with the earlier Supreme Court decisions, the CJI committee viewed the Godsey rule as merely a limitation of the term "curtilage." Godsey involved an act that occurred near the lot line of the defendant's property. Thus, the committee observed that "in People v Godsey, * * *, the no-retreat rule was held not to extend to the lot line of the property." Commentary,

Godsey majority disagreed with those who viewed Pond as standing for the proposition that the no-retreat rule "embraces the curtilage of a house." 54 Mich App at 320. This view was, in the Godsey majority's words, "unjustifiably expansive." Id. Instead, decided the Godsey majority, because Pond's act occurred within a "net house" inhabited by two of Pond's employees, Pond stood only for a rule that the right of no-retreat extends to "inhabited outbuildings located within the curtilage of the home." 54 Mich App at 321.[26]

D. THE GODSEY LIMITATION ON THE CASTLE DOCTRINE IS INCONSISTENT NOT ONLY WITH THIS COURT'S LONGSTANDING PRECEDENTS, BUT ALSO WITH THE COURT OF APPEALS' OWN APPROACH IN OTHER CASES.

The majority view in Godsey is fatally flawed. As the dissent points out, the majority utterly failed to consider a more important source than scholarly articles for an "expansive" reading of Pond: this Court's decision in People v Lilly, 38 Mich 270 (1878). When he stabbed an attacker to death, Lilly was outside his house, fully ten feet from his back door, and not inside any outbuilding, inhabited or otherwise. Lilly, 38 Mich at 274-75. The trial judge charged the jury that the killing was unjustified if Lilly "could have saved himself from all serious harm **by retreating** or calling for assistance," but instead chose to resist the attack; or if Lilly, knowing that his attacker had "c[o]me to his premises with the intention of seeking a combat with him," could have "avoided such combat by all reasonable means," but instead "chose to

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Defenses, CJI 7-196 (1st ed). By the time of the CJI's second edition, however, the committee had accepted a more literal reading of Godsey, now advising that the no-retreat instruction may be given "when the act occurred **in inhabited dwellings** within the curtilage of the defendant's dwelling," Use Note to CJI2d 7.17 (emphasis added); see also Use Note to CJI2d 7.16 (duty-to-retreat instruction may not be given "if the act occurred in the defendant's dwelling or in inhabited buildings within its curtilage").

stand up and resist the assault." Lilly, 38 Mich at 275 (emphasis added). In other words, the judge told the jury that Lilly had a duty to retreat. This Court rejected such a duty:

> "The jury should have been instructed in effect that if they were satisfied that Lilly **being at his own house** had reason to believe and did believe from [his attacker's] previous and present language manner and actions, and what had already taken place, that it was necessary to inflict the wounds he did inflict upon [his attacker] to save his own life or to protect himself from danger of great bodily harm, he was excused." Lilly, 38 Mich at 276 (emphasis added).

Thus, this Court held that the no-retreat rule applies when the defendant is "at his own house" (or, in the trial court's formulation, on his own "premises"), even though not inside it. Godsey mistakenly ignored Lilly.[27]

There is another reason for rejecting the Godsey limitation on the no-retreat rule: it does not make sense. The Godsey majority noted two possible bases for a no-retreat rule: the

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[26] Since Godsey was decided, the Michigan Court of Appeals has offered a radically different reading of Pond. In People v Crow, 128 Mich App 477, 487-88 (1983), the Court interpreted Pond as following the English common-law rule that a person without fault need never retreat from a felonious attack.

[27] The Court of Appeals, below, thought Lilly not inconsistent with a duty to retreat outside the dwelling. Opinion at 4-5 (defendant-appellant's appendix at 16a-17a). It reasoned,

> "[t]he [Lilly]Court was concerned that the trial court had instructed the jury that (1) the defendant had to call for assistance from others and wait to see if others would come to his aid before he could exercise self defense, and (2) that the defendant had to flee from his home to resist the aggressor even though in doing so, his wife and children would remain there at the mercy of the aggressor. The Lilly Court never said that the defendant was entitled to a no-duty-to-retreat instruction." Id.

This analysis is wrong. The trial judge in Lilly told the jury that Lilly had no right to stand his ground if he could have called for assistance or retreated. Lilly, 38 Mich at 275. The trial judge never said *to where* Lilly should have retreated; the bare word "retreating" he used could have meant into the dwelling as well as away from it. That this Court interpreted the instruction to mean retreating away from it, and not into it, simply underscores the point that this Court was making no distinction between being inside or immediately outside the dwelling. The idea that a person standing just outside that person's home would be required to retreat *within it* was apparently foreign to this Court.

"instinctive" belief that a person's home is sacred, and that he should not suffer being made a fugitive from it; and the "pragmatic" view that the person's home is presumptively the safest haven from attack, from which no further retreat is advisable. Godsey, 54 Mich App at 319. Neither rationale can explain why the rule of no-retreat should extend from a defendant's home to those of others who live on his property, but not to his own yard, driveway, or garage. Indeed, the Court of Appeals has otherwise rejected the notion that a person can claim the right of no-retreat in a house in which he does not actually live. People v Davis, 216 Mich App 47, 54-55 (1996) (no right of no-retreat in house defendant owned, but in which he did not reside).

The Godsey approach is also inconsistent with the trend to expand the castle doctrine to one's workplace,[28] and even one's automobile.[29]

E. THIS COURT SHOULD ADOPT A RULE OF NO-RETREAT, OR AT LEAST RETURN TO THE TRADITIONAL MICHIGAN VIEW OF NO-RETREAT-WITHIN-THE-CURTILAGE.

Michigan should join the majority of jurisdictions that follow the traditional view that a person who has done no wrong and is in a place where he or she has a right to be need not be cowed into flight by an attacker's threat of deadly violence, but may instead answer that attack in kind. This majority view not only honors the American values of independence and

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Again, the judge told the jury that Lilly's use of force was unauthorized if he could have saved himself by retreating, and this Court held that instruction wrong because Lilly was "at his own house." Lilly, 38 Mich at 276. That Lilly had no duty to retreat is necessarily implied.

[28] The Michigan Court of Appeals has noted that "a majority of jurisdictions" have adopted a rule of no-retreat in one's place of business, and though not adopting that rule for all cases has applied it when the person attacked was an on-duty security guard whose job was to protect theater patrons. People v Joesype Johnson, 75 Mich App 337, 341-42 (1977). But see People v Dabish, 181 Mich App 469, 476 (1989) (in case of asserted self-defense at place of business, no error to give duty-to-retreat instruction where (i) "presently" Michigan does not apply broad no-retreat rule for places of business, and (ii) particular facts of case militated against application of such a rule).

self-reliance, it puts would-be violent aggressors on notice that they risk their own demise, and thereby promotes a social good. Moreover, it places the onus for making level-headed decisions on the would-be attacker, where it should be, rather than on the innocent attacked.

At the least, this Court should reaffirm a view it has never abandoned: that a person attacked just outside the home may stand his or her ground. Such a view is in keeping not just with this Court's early jurisprudence, but also with its more recent pronouncement about the traditional extent of the "castle": "From the earliest days to the present time, a Michigan citizen has not only been 'king of his castle,' but all he possessed within the curtilage.'" In re Winkle, 372 Mich 292, 309 (1964). Persons confronted by violent aggressors within the curtilage ought to be able to stand their ground to the same extent as if they were attacked inside the actual dwelling. Furthermore, the idea that the dwelling may be any safer than the area just outside it will sometimes be an illusion. Even when momentary retreat into the dwelling is possible, if the aggressor continues the attack others already inside the dwelling will be put at risk. At a time when courts, including Michigan courts, are increasingly expanding the right of no-retreat to areas such as one's place of business or one's vehicle, it does not make sense to take the right away from persons on their own property, immediately outside their dwellings.[30]

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[29] See People v Crow, 128 Mich App 477, 489 (1983) (in case where defendant attacked by hitchhiker in own car, error to give duty-to-retreat instruction).

[30] At the very least, this Court should treat the garage as part of the dwelling. As one federal court of appeal recently observed, in United States v Oaxaca, 233 F3d 1154, 1157 (CA 9, 2000):

> "We can conceive of no reason to distinguish a garage, where people spend time, work, and store their possessions, from a den or a kitchen, where people spend time, work, and store their possessions. Simply put, a person's garage is as much a part of his castle as the rest of his home."

If the garage is part of the dwelling, then Mr. Riddle, who was at the entrance to his garage when attacked, was entitled to a no-retreat instruction.

F. UNDER EITHER VIEW, MARCEL RIDDLE IS ENTITLED TO A NEW TRIAL.

Because when the attack occurred Marcel Riddle was at the threshold of his garage, within the curtilage of his home, under either a no-retreat or a no-retreat-within-the-curtilage view he was entitled to the no-duty-to-retreat instruction he requested. The trial judge erred by refusing his request for it, and compounded the error by instructing that Mr. Riddle had a duty to retreat.

The error was not harmless because whether or not Mr. Riddle should have retreated was an issue that the prosecutor forcefully injected into the case, and one that to the jury was more likely than not determinative. See People v Lukity, 460 Mich 484 (1999). The prosecutor pressed Mr. Riddle hard on why he had not retreated, then told the jury that his failure to retreat was reason enough to convict him. The jury had ample reason to prefer Mr. Riddle's explanation of the incident to James Billingsley's. In key respects Mr. Riddle's version was corroborated and Mr. Billingsley's refuted by two other witnesses: Anita Marshall, Mr. Riddle's girlfriend, and William Hobson, a young neighbor with no apparent apparent bias. Even if they believed Mr. Riddle, however, according to the prosecutor's contention, supported by the erroneous instructions, he was still guilty. The error was not harmless.

The remedy is to reverse and remand for retrial.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his conviction and remand the matter for a new trial.

Respectfully submitted,

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BY:_____

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